Supreme Court, U. S.
FILED
AUG 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-198

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

Ronald S. Boucher,

Petitioner,

v.

City of Havre and County of Hill, political subdivisions of the State of Montana,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

## RESPONDENT COUNTY OF HILL'S BRIEF IN OPPOSITION

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## JURISDICTION:

A Federal question was never raised in the Montana Supreme Court; there are no "special" or "important" reasons for review. There was no unexpected construction of the Montana Tort Claims Act. It was construed as the Federal Tort Claims Act and similar acts passed to alleviate the harshness of sovereign immunity have been construed by most Federal and State Courts.

Petitioner admits (page 7 of Petition) that the "due process" argument raised here was never raised before. No Federal question was decided by the Montana Supreme Court. Rule 17 U.S. Supreme Court Rules; 28 U.S.C.A. 1257 (3).

## QUESTION PRESENTED:

If a Federal question had been presented and decided, would the Montana Supreme Court decision have violated 14th Amendment due process in granting a summary judgment to the City and County against whom Petitioner brought an action under respondeat superior for the allegedly intentional and negligent conduct of a police officer, after Petitioner dismissed its action against that police officer "with prejudice".

## STATEMENT OF FACTS:

A police officer interrupted a 3:00 A.M. burglary of a residence-grocery. After discovering blood on a broken window, the police officer saw and ordered Petitioner to come out, and advised him he was under arrest. Petitioner fled and the police officer, after giving three warnings, shot and wounded him. Petitioner pleaded guility to and was sentenced for the burglary.

Petitioner admitted that the officer advised him he was under arrest; that he was attempting to escape and that he told the officer he would have to shoot him. The officer did not know if Petitioner was armed.

Suit was commenced by Petitioner against the police

officer, the City of Havre and the County of Hill, political subdivisions of the State of Montana, under "respondeat superior" (page 4 of Complaint states "the relationship of respondeat superior existed between the City of Havre, the County of Hill * * * and said Defendant, Rex Dramstad."). In his memorandum in opposition to defendants' motion for summary judgment dated November 8, 1978, Petitioner argued that the doctrine of respondeat superior applied.

**ARGUMENT:**

Petitioner now argues that the Montana Tort Claims Act, hereinafter referred to as MTCA, found at A-33 of his Petition, "precludes any recovery from the police officer" (page 9 of Petition); that the MTCA "effectively precludes recovery against the individual employee * * * that only Respondents were the real parties in interest * * * that there was no possibility of recovery against the policeman" (page 14 of Petition) and that "the State Court invoked a new procedural rule that dismissal of a non-responsible party * * * exonerates the liable parties." (page 15 of Petition) These statements are not correct.

MTCA, Section 2-9-305(1), provides that the purpose of the action is "to provide for the immunization and indemnification of public officers and employees sued for their acts, other than intentional tort or felonious acts, taken within the course and scope of their employment."

MTCA also provides at 2-9-305(2): " * * * the employee whose conduct gave rise to the suit shall be immune from suit * * * if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of such employee's employment, unless the claim is based upon an intentional tort * * * of the employee."

Thus, the MTCA twice states that it excludes a governmental employee from immunity for an intentional

tort and alters the doctrine of vicarious liability for negligent torts only insofar as to take the right of indemnification from the governmental entity against its employee after the entity admits or there is a judicial determination of employer-employee relationship.

The County of Hill has always denied there was an employer-employee relationship and there has never been such a judicial determination.

The common law, general, and Montana rule is that a county is not liable for the negligence of its officers unless such liability is expressly fixed by statute, 57 AmJur2d 14, Witter v. Phillips County, 111 Mont. 352, 109 Pac.2d. 56 (1941), Jacoby v. Chouteau County, 112 Mont. 70, 112 Pac.2d. 1068 (1941).

The MTCA, like the Federal Tort Claims Act, hereinafter referred to as the FTCA, and similar acts were passed to alleviate the harshness of the common law sovereign immunity rule, and, with certain exceptions, to render the government liable as a private individual would be under like circumstances. 28 U.S.C.A §1346(b), §2680. Thus the State Court's reliance upon cases such as Barnes v. McGee, 21 N.C.App. 287, 204 S.E.2d. 203 (1974) and DeGraff v. Smith, 62 Ariz. 261, 157 P.2d. 342 (1945), is not "misplaced" (p. 15 of Petition) but appropriate. Such acts permit the governmental entity to be liable only in the manner and to the extent it has consented. Spillway Marina, Inc. v. U.S., 445 Fed.2d. 876 (1971). They grant a partial waiver only of sovereign immunity. Areskog v. U.S., 396 F.Supp. 834 (1975). Even the FTCA incorporated the common law rules of the state. Galimi v. Jetko, Inc., 514 Fed.2d. 949 (1975). Berretoni v. U.S., 263 F.Supp. 907 (Mont. 1967), Williams v. U.S., 350 U.S. 857, 100 L.Ed. 761, 76 S.Ct. 100 (1955), National Mfg. Co. v. U.S., 210 F.2d 263 (1954), cert. den., 247 U.S. 967, 98 L.Ed. 1108, 74 S.Ct. 778 (1954), Marusa v. D.C., 484 F.2d. 828 (1973), 35 AmJur2d, Federal Tort Claims Act, §§61, 62.

The Montana law prior to State of Montana v. District Court, 170 Mont. 15; 550 Pac.2d. 382 (1976) was that the

sovereign was immune from suit. Kingfisher v. City of Forsyth, 132 Mont. 39, 314 Pac.2d. 876 (1957), and Boettger v. Emp. Liability Assur. Corp., 158 Mont. 258, 490 Pac.2d. 717 (1971). State v. District Court, cited supra, held specifically that since the passage of the MTCA and the adoption of the 1972 Montana Constitution, Article II, Section 18, a master-servant relationship exists between a City and its police officers acting in the course and scope of their employment.

The common law, general and Montana rule is that if the Plaintiff exonerates the servant, he also exonerates the master whose liability can only be vicarious or derivative, 57 C.J.S. 421, Section 619b; 53 AmJur2d 413, Section 406; Lowney v. Butte Electric Co., 61 Mont. 492, 204 Pac. 485 (1921), and a dismissal "with prejudice" pursuant to stipulation and order is an adjudication on the merits under Rule 41(b) of the Montana Rules of Civil Procedure, which is the same as Rule 41(b) of the Federal Rules of Civil Procedure, and is res judicata of the matters covered by the claim. 9 Federal Practice & Procedure, Wright & Miller, 229, §2373;5 Moore's Federal Practice, §§ 41.02(2), 41.02(5), 41.05(2); 35 C.J.S. Federal Civil Procedure §775(a).

Federal Courts have also held that the United States is exonerated by a release of its employee under the FTCA applying state law. Matland v. U.S., 285 F.2d. 752 (1961), followed the state common law rule. See also Bacon v. U.S., 209 F.Supp. 811 (1962), aff'd., 32 F.2d. 880 (1963); Land v. U.S., 231 F.Supp: 883 (1964), aff'd., 342 F.2d. 785 (1965).

The MTCA excepts intentional torts from immunization or indemnification. The FTCA similarly excepts claims arising out of assault and battery and the Federal Courts have recognized such exceptions. Coffey v. U.S., 387 F.Supp. 539 (1975), U.S. v. Faneca, 332 F.2d. 872 (1964).

The Petition statement at page 17, "the express language of the tort claims act made the officer an unnecessary party

to the litigation" is also not correct. The statute quoted at A-33 of Petition specifically states:

> *"Governmental entity to be joined as defendant * * * (2) in an action brought against any employee of a * * * county, city, * * * or other governmental entity * * * the governmental entity employer shall be made a party defendant to the action. * * * (4) in any action in which a governmental entity employee is a party defendant, * * *."*

The language clearly intends the employee be made a party to the action.

The Petition states at page 17, "All other relevant Federal and State cases have rejected such a rule" (evidently speaking of the rule that the exoneration of the employee is also exoneration of the employer). Petitioner then cites three cases in support of this statement. The first, Garrett v. Jeffcoat, 483 So.2d. 590 (1973), was brought under the Federal Drivers Act (F.D.A.), which makes the United States solely liable for the negligent acts of its employees operating automobiles within the scope of their employment. The F.D.A. specifically does away with any claim against the employee, making the liability of the United States primary and exclusive. The MTCA does not.

The second case, Munson v. U.S., 380 So.2d. 976 (1967), which clearly recognizes the general rule to be that the release of the servant exonerates the master, simply holds that under the FTCA the U.S. is not entitled to indemnity, and therefore a release of the servant is not a release of the master since the reason for the rule, indemnification from the servant, no longer exists. The MTCA reserves the right to indemnity for an intentional tort of the servant, and for a negligent tort unless the governmental entity acknowledges or there is a judicial determination of the agency, therefore the reason for the rule enunciated in Munson does not exist.

The third case, Montoya v. City of Albuquerque, 82 N.M. 90, 476 P.2d. 60 (1970), was brought under a New Mexico statute which provides that either, but not both,

the municipality or the employee may be held liable. The case also recognizes the general rule that the release of the servant is a release of the master, but holds that since their statute requires the Plaintiff to elect, and specifically eliminates the derivative nature of the liability, the general rule does not apply. The MTCA does not require the Plaintiff to elect and does not eliminate the derivative nature of the liability.

The rule of construction applicable to a state statute is stated in Pritchard Petroleum Co. v. Farmers Co-Op Oil and Supply Co., 121 Mont. 1, 15, 190 P.2d. 55, 62 (1948):

> *" * * * a statute upon a subject governed by the common law is not presumed to make any alterations in that law further than is expressly declared, and * * * does not take away the common law save to the extent that it is expressly or by necessary implication so declared. 50 AmJur pp. 339-340, par. 346 and cases cited.*
>
> *"This is the rule in Montana * * * "*

A statute is not presumed to work any changes in the rules or common law beyond what is expressed in its provisions and those provisions do not alter common law unless the intent to do so is clear. Schwartz v. Inspiration Gold Mining Co., 15 F.Supp. 1030 (1936).

The Legislature clearly intended to retain the common law rules of indemnification for an intentional tort and where the agency relationship was not admitted or judicially determined, and specifically did so in the MTCA.

Petitioner's interpretation of the statute would render meaningless the language of the statute expressly reserving common law indemnification where the tort is intentional or where the agency relationship has not been admitted or judicially determined.

The statute is not ambiguous, and its letter may not be disregarded under the pretext of pursuing its spirit. Cruse, et al.v. Fischl, 175 P. 878, 55 Mont. 258 (1918); State v. State Highway Comm., 267 P. 299, 82 Mont. 382 (1928),

Vaughn & Ragsdale Co. v. State Board of Equalization, 96 P.2d. 420, 109 Mont. 52 (1939).

## CONCLUSION:

1. There is no Federal question.
2. No Federal question was ever raised or decided.
3. Had there been a Federal question presented, there was no violation of due process. The Petition is based upon the incorrect contention that the MTCA eliminated all personal liability of governmental employees and the common law rule that exoneration of the servant is exoneration of the master.
4. Petitioner would have the Court ignore the rules of statutory construction and render those provisions of the MTCA meaningless which expressly reserve common law indemnification where the tort is intentional or where the agency relationship has not been admitted or judicially determined, which construction would be expressly contrary to the clear legislative intent.

The Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 26th day of August, 1980.

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